

REMARKS

Claims 1-29 are pending in the application, with claims 1, 8, 9, 16, 17, 24 and 25 being currently amended and dependent claims 26-29 being newly added.

New dependent claims 26-29 define the woven terry fabric as a towel. Support for the new claims can be found at paragraph [0018], for example.

In addition, each of currently amended independent claims 1, 9, 17, and 25 now recite that the woven terry fabric comprises, in part, "a plurality of pile loops including natural fibers of cotton". And, dependent claims 8, 16, and 24 are currently amended so as to properly depend from amended claims 1, 9, and 17, respectively. Support for the amendments can be found at least at paragraphs [0013] through [0016], for example.

Examiner maintains his rejection of all of the claims under 35 U.S.C. 103 as being obvious over Heiman U.S. Patent No. 4,726,400 ("Heiman"). That is the only rejection asserted. As explained in the Response dated October 16, 2006, Applicant submits that a *prima facie* case has not been made. Applicant will not reiterate those points here but, without waiver of that position, will focus here on the secondary evidence of record establishing the patentability of the invention, which evidence Examiner wrongfully, and unlawfully, discards.

The secondary evidence is of record in the following three declarations:

- A. "Eubanks Decl.", namely, the Declaration of Mr. Greg Eubanks, Group Vice President of Hospitality Sales for Standard Textile Co., Inc. ("Standard Textile"), the assignee of the present application.
- B. "Rodriguez Decl.", namely, the Declaration of Mr. Gerald Rodriguez, Vice President of Purchasing for LQ Management LLC ("La Quinta"), known for their La Quinta Inns and Suites. La Quinta is a customer of Standard Textile.

C. "Brady Decl.", namely, the Declaration of Mr. David Brady, Vice President of Operations for Brady Linen Services, LLC ("Brady Linen"), and also a customer of Standard Textile.

Examiner's criticisms, as explained further below, are not legally cognizable, but rather are red herrings, which deserve little credence. Indeed, in certain instances, Examiner assumes facts that are directly at odds with the Declarations, and that is legal error.

Examiner criticizes the Eubanks Decl. because it makes reference to "cotton pile loops" and suggests that there is no nexus between the Eubanks Decl. and the claims which reference "natural fibers". *See* Official Action, page 4. But the specification clearly states that all-natural pile loops can include all-natural cotton yarn. *See* Paragraphs [0014] and [0016]. Nothing more is required to establish nexus. Nonetheless, and without waiver, the claims have been amended to recite natural fibers "of cotton" thereby rendering the point moot.

Examiner next attempts to impose a standard for commercial success that is neither logical nor supported in law. In particular, Examiner chastises Applicant because the Eubanks Decl. discusses specific products, i.e., Centium towels, which are of a woven terry fabric, rather than discussing fabric generally. *See* Official Action, page 4. Examiner has no lawful basis to do so. The only products being marketed by Applicant's assignee under the patent are those very Centium towels. It is those products that establish the commercial success of the invention. Indeed, Examiner cites no law, and it is submitted there is no law, that would require an Applicant to show commercial success except but by reference to the very product covered by the claims. Hence, it is entirely appropriate and logical that it is the Centium towels, which are specifically addressed in the Eubanks Decl., as well as the Rodriguez Decl. and Brady Decl.

Examiner nonetheless continues to maintain that, even though the Centium towels are literally covered by the claims, there is no nexus between a "terry towel" such as the Centium towel, and a "terry fabric". Such a position is absurd. The Centium towels are terry fabrics and Examiner has no lawful basis to say otherwise. Indeed, the Centium towels are literal examples of product covered by the claims in that the Centium towels unquestionably include a warp and/or fill yarn consisting essentially of non-moisture-transporting synthetic filament and being devoid of moisture transporting fiber, and pile loops including natural fibers of cotton woven together with the warp and fill yarns in a three-pick terry weave, all as required by the claims. The factual allegations of the Eubanks Decl., and particularly when considered together with the Rodriguez Decl. and Brady Decl., leave no room for doubt on that point.¹

Examiner also criticizes the Eubanks Decl. for failing to provide information regarding % market share. To that end, Examiner asks whether this a substantial share of a definable market and if profitability per unit is out of the ordinary. *See* Official Action, page 4. There is nothing in law that requires evidence of % market share, and Examiner's speculations to the contrary are simply red herrings that deserve no credence. Surely, Examiner is aware that gross sales figures as to the time period during which the product was sold, rather than % market share, may be used to show commercial success. *See Ex parte Standish*, 10 USPQ2d 1454 (Bd. Pat. App. & Inter. 1988) and MPEP 716.03 both supporting the proposition that with evidence as to the time period during which the product was sold, gross sales figures may be used to support commercial success.

¹ In any event, Applicant directs Examiner's attention to new dependent claims 26-29, which specifically recite that the woven terry fabric defines a towel.

Accordingly, Applicant, as clearly permitted, proves commercial success by providing gross sales figures as to the time period during which the product was sold. In particular, the Eubanks Decl. sets forth in Paragraph 5 that Standard Textile began "producing and selling the Centium Products in March 2006, such Centium Products including polyester fill yarns, cotton (or cottonpoly blend) warp yarns, and cotton pile loops woven together in a three-pick terry weave, as claimed." And, that "over the period from March 2006 through December 2006, sales of the Centium Products, in terms of both units sold and monthly revenue, have increased over 3 fold" with total revenue for the partial 2006 calendar year totaling about 3 million dollars, despite below industry advertising expenses. Eubanks Decl., Paragraph 6. Further yet, based on current orders and projections of future orders, Mr. Eubanks estimates that "Standard Textile will sell at least about 4 million units of Centium Products for a total revenue of greater than about \$7.7 million in 2007." Eubanks Decl., Paragraph 6.

In view of the above, Examiner has no lawful basis to ignore clear evidence of commercial success or require other forms of evidence under the circumstances, such as % market share.

Also in the Official Action, Examiner further remarks that it is not clear what % of products exhibited in section 8 of the Eubanks Decl. were actually Centium products. *See* Official Action, page 4. While not providing an exact percent of advertising dollars attributable to the Centium products as compared to the non-Centium products in section 8, Applicant provides more than sufficient information to make a determination as to the trivial (if not non-existent) effect advertising may have had on the

commercial success of Applicant's claimed invention.² In any event, it is clearly stated that "even if the entirety of the tradeshow registration fees are allocated to the Centium Products alone, the above total would be about 6% of current sales, which is understood to be below the average in this industry for a specific product." Eubanks Decl., Paragraph 8. Based thereon, it is more than evident that advertising has not been a significant factor in the commercial success of Applicant's claimed woven terry fabric.

For all of the above reasons, the Eubank's Decl. is more than sufficient to overcome the present obviousness rejections based on Heiman, and particularly when viewed in combination with the Rodriguez Decl. and Brady Decl., which are taken up next.

Concerning the Rodriguez Decl, Examiner rejects this Declaration based solely on the unfounded speculation that an "increase in sales [of Centium products vs. non-Centium products] could have easily been due to the decreased price alone as stated in [the] declaration rather than being due to claimed limitations of the instant invention".³ See Official Action, page 5. Examiner's speculation concerning increases in sales is directly at odds with statements from the Rodriguez Decl., which unequivocally speak to

² As Mr. Eubanks explains: "Standard Textile's direct advertising expense for the Centium Products has consisted of the placement of a single advertisement in one issue of an industry trade publication at a cost of about 25K. Standard Textile also participates in about twenty tradeshow annually with registration fees totaling about 150K . . . The direct advertising expenses (of about 25K) and a small portion of the tradeshow fees (small portion of about 150K) is to be compared to total sales of about 3 million in just 10 months." Eubanks Decl., Paragraph 8.

³ Examiner also asks over what time frame purchases were made by LaQuinta. The purchasing information is clearly set out in Paragraphs 5 and 6 of the Rodriguez Decl. In particular, Mr. Rodriguez states under penalty of law that "from July 2006 to the end of December 2006, La Quinta has purchased over 273,000 units of Centium Products...with purchasing costs for the Centium Products totaling about \$365K (or about \$61,000 per month)"; and that "prior to purchasing Centium Products, i.e., since April 2005, and through to the end of December 2006, La Quinta has purchased from Standard Textile over 747,000 units of [non-Centium Products]...with purchasing costs for the non-Centium Products totaling about \$1.2 million (\$57,000/month)." Rodriguez Decl., Paragraphs 5 and 6. And, that "for the partial 2005 calendar year, the units of non-Centium Products that were purchased included 415,631 units (46,181 units/month) whereas the units purchased in the entirety of 2006 included 332,280 units (27,690 units/month), which represents a decrease in units of about 40%." Rodriguez Decl., Paragraphs 5 and 6.

the commercial success owing directly to the claimed invention. Indeed, Mr. Rodriguez is very clear as to why LaQuinta began purchasing the Centium products and correspondingly reduced purchases of the non-Centium products. In particular, in making a decision to reduce the total number of units of the non-Centium Products in 2006 and to begin purchasing the Centium Products, Mr. Rodriguez states:

La Quinta recognized that the Centium Products provided a better construction over comparable non-Centium Products. For example, the Centium Products provide increased fluffiness and satisfactory durability, which allows La Quinta to purchase a lower weight and less expensive towel (as compared to the comparable non-Centium Products) without sacrificing comfort or quality. As such, due to the construction of the Centium Products,...La Quinta has managed to reduce overall expenses, yet, maintain guest satisfaction at its hotel properties by using the Centium Product."

Rodriguez Decl., Paragraph 7. As a matter of law, Examiner may not rely on speculation to create fictitious reasons about sales increases, especially in the face of the uncontradicted factual evidence showing the actual reasons, all of which relate to the claimed invention.

Finally, concerning the Brady Decl., Examiner takes a similar position and summarily dismisses the Brady Decl. solely because "there is no [specific] discussion with respect to increase in cost per unit Brady Linen was willing to pay". To that end, Examiner incorrectly assumes that even "a negligible increase would not speak to the commercial success of the claimed limitations of the claimed invention". *See* Official Action, page 5. Like the Rodriguez Decl., Examiner's comments are contrary to statements from the Brady Decl. and, thus, not legally cognizable.

In an effort to dismiss the Brady Decl., Examiner completely disregards the realities of the marketplace by overlooking the fact that Centium products are

purchased in bulk, and not one at a time. Thus, even a negligible increase can add up to significant dollars. Indeed, an increase of just a penny per unit can cost a business owner, like Mr. Brady, thousands of additional dollars. Not only is it improper for Examiner to speculate as to the breaking point for Mr. Brady with regards to increase in cost, but such speculation is beside the point. Regardless, the fact is that Mr. Brady wanted the Centium products; those products were determined to be better than the non-Centium products; and he was willing to pay more money for them.⁴ Like the Rodriguez Decl., the only appropriate conclusion based on a thorough reading of the Brady Decl. is that Brady Linen's purchases of Centium products was due to the claimed invention. Nothing further is, or lawfully can be, required.

For all of the above reasons, Applicant submits that the foregoing Declarations, particularly when taken as a whole, clearly establish the commercial success of the claimed woven terry fabric and the nexus between those sales and the claimed features of the invention. Indeed, Applicants have shown that there is commercial success of its product (in terms of increased sales of despite below industry advertising expenses), and that such product is the invention disclosed and claimed. *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1541-1543, 218 USPQ 871 (Fed. Cir. 1983). To that end, Applicants have clearly and conclusively proven all that is required to make out a *prima facie* case of commercial success.

Applicant thus submits that in this case, the Declarations as discussed above (as well as the patentability arguments set forth in the Response dated October 16, 2006 in their own right) weigh overwhelmingly in favor of a conclusion of patentability.

⁴ Mr. Brady is quite specific: "Brady Linen recognized that the Centium Products provided a better construction as compared to the non-Centium Products. For example, the Centium Products provide a greater durability. As such, due to the construction of the Centium Products, . . . Brady Linen was willing to spend and, in fact, spends more per unit on the Centium Products than the previous non-Centium Products." Brady Decl., Paragraph 7.

Therefore, it is respectfully submitted that the rejections of the claims as obvious over Heiman are in error and should be withdrawn.

Conclusion

As a result of the remarks given herein, Applicant submits that the rejections of the claims have been overcome. Therefore, Applicant respectfully submits that this case is in condition for allowance and requests allowance of the pending claims.

If this Response leaves any issues open or Examiner wishes to discuss any further issues, a call to undersigned counsel would be gratefully appreciated. Applicant also has submitted all fees believed to be necessary herewith. Should any additional fees or surcharges be deemed necessary, Examiner has authorization to charge fees or credit any overpayment to Deposit Account No. 23-3000.

Respectfully submitted,
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